

APPEAL NO. 013125-s
FILED FEBRUARY 13, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on November 29, 2001. In resolving the issues before him, the hearing officer determined that the appellant (claimant) was not entitled to additional temporary income benefits (TIBs) for the period that he received payments from the employer pursuant to its Unavoidable Absence/Occupational Injury and Illness Benefits (UAB) policy. The hearing officer also added a conclusion of law, unattached to a certified issue, which read that the carrier is entitled to a credit against TIBs which it would otherwise be required to pay for the period during which the claimant received payment of such benefits from the employer pursuant to its UAB policy. The claimant, seeking reversal, appeals the determination, and the respondent (carrier) responds, urging affirmance.

DECISION

Reversed and rendered.

The hearing officer erred in determining that the claimant was not entitled to additional TIBs for the period that he received payments from the employer pursuant to its UAB policy. The hearing officer also erred in determining that the carrier is entitled to a credit against TIBs which it would otherwise be required to pay for the period during which the claimant received payment of such benefits from the employer pursuant to its UAB policy. The claimant alleges¹ that he incurred lost wages as a result of his compensable injury from an explosion at the employer's plant on March 27, 2000. "Lost wages" are defined in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.2(b) (Rule 129.2(b)), as "the difference between the employee's gross average weekly wage (AWW) and the employee's gross Post-Injury Earnings (PIE)."

In this case, the parties stipulated that the claimant's AWW was \$1,054.41. The hearing officer found that the claimant's "regular weekly pay," based on a 40-hour work week as defined in the UAB policy, was \$938.80, and that amount² was not appealed by the parties. The evidence shows that the UAB policy benefits were a part of the result of a collective bargaining agreement (CBA) between the claimant's union and the employer.³ However, the hearing officer erroneously decided that because union and nonunion employees alike received UAB benefits, then the CBA was not one as described in Rule

¹The claimant's allegations dealt with in this opinion relate to one of two alternate arguments made by the claimant.

²We note here that the claimant appealed the hearing officer's characterization of the amount as "wages," which was a misguided challenge, as it appears that the hearing officer was just quoting what the amount would be called, per the UAB policy, and not at that point making any wage or other determination.

³While the carrier tries to dispute the CBA in argument, it produces absolutely no evidence to contradict the testimony, or the CBA document, presented by the claimant showing that those particular benefits were indeed negotiated.

129.2. It is not in dispute that the claimant received the UAB policy benefits. The UAB policy provided that, in the case of an employee's "unavoidable absence," it would pay benefits to the employee, for the first 26 weeks, in an amount up to 100% of his "regular weekly pay," and that it would pay up to 50% of the employee's "regular weekly pay" for the next 26 weeks. It is undisputed that the *employer* paid the claimant a total of \$938.80 per week for the first 26 weeks of his "unavoidable absence." It is further undisputed that the claimant received \$469.40 per week from the employer and \$61.60 per week from the carrier for the second 26 weeks of his absence from the job.

The dispute in this case is the *nature* of the payments made by the employer. The carrier claims that the monies paid during the first 26 weeks were \$531.00 TIBs and \$407.80 UAB benefits per week and that all \$531.00 per week during the second 26 weeks were TIBs. The claimant argues that the UAB benefits set out in the policy are to be considered PIE. The hearing officer also erred in finding that any of the monies paid by the employer were TIBs. Under current workers' compensation law, only the carrier can pay TIBs; the employer may pay additional monetary benefits to an employee, but such benefits are not to be considered TIBs.

According to Rule 129.2(c)(6)(A), PIE shall include, but not be limited to, the documented weekly amount of "a contractual obligation between the employer and the employee including *through a collective bargaining agreement*." (Emphasis added). Rule 129.3(f) prescribes that, subject to the maximum (\$531.00) and the minimum weekly TIBs rates, the employee is entitled to TIBs to be calculated as the employee's PIE subtracted from his AWW, multiplied by 70%, or $(AWW - PIE) \times 70\%$. Therefore, since the claimant's AWW has been stipulated to be \$1,054.41 and his UAB policy allowed him benefits in the amount of \$938.80 per week for the first 26 weeks and \$469.40 per week for the second 26 weeks, we order that the \$938.80 is claimant's PIE for the first 26 weeks and \$469.40 for the second 26 weeks. PIE should be subtracted from his AWW, which sum should be multiplied by 70% to calculate the TIBs rates.

The carrier argues that the UAB policy allows for the employer to pay what it refers to as "TIBs" in lieu of the carrier, and that it paid the claimant in accordance with workers' compensation benefits. While Rule 129.2(d)(4) allows that the amounts paid by the employer to the employee in lieu of TIBs may be taken out of the PIE if the employer has or "intends to" seek reimbursement from the carrier, the employer has not filed a form seeking reimbursement from the carrier, nor has it declared its intention to do so. See *also*, Section 408.003(c) - (h) of the 1989 Act. The carrier then argues that the claimant was nevertheless on notice of the fact that the employer would be paying "TIBs" under the UAB policy. As noted earlier, only the carrier can pay TIBs. The UAB policy benefits as defined therein do not govern the determination of the amount of or eligibility for TIBs to which the claimant is entitled; the UAB policy addresses only when and how much UAB policy benefits will be paid to an employee. TIBs entitlement and the determination of the amount owed to the claimant are governed by the 1989 Act and Texas Workers' Compensation Commission Rules, as cited herein, and are paid exclusively by the carrier.

We further note for the record that at the date of the expiration of the UAB policy benefits (the date that the employer merged with another company--January 1, 2001), the carrier began paying the claimant \$531.00 weekly for TIBs until September 19, 2001, at which time the carrier began paying impairment income benefits to the claimant.

The hearing officer's decision and order is reversed, and we render a decision that the claimant is entitled to TIBs payments consistent with this decision and to be calculated in accordance with Rule 129.2, along with interest on any unpaid accrued benefits. In addition, we determine that the carrier is not entitled to any credit for UAB policy benefits paid by the employer to the claimant.

The true corporate name of the insurance carrier is **PACIFIC EMPLOYERS INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**MARCUS CHARLES MERRITT
6600 CAMPUS CIRCLE DRIVE EAST
IRVING, TEXAS 75063.**

Gary L. Kilgore
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Terri Kay Oliver
Appeals Judge